

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1422

JOSEPH F. SHANAHAN,
Appellant,

v.

OSCAR W. RITTENHOUSE, etc.,
Appellee.

On Appeal from the New Jersey Superior Court,
Appellate Division

MOTION TO DISMISS OR AFFIRM

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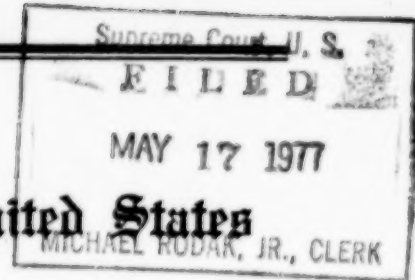


TABLE OF CONTENTS

	PAGE
I—The Statute Involved and the Nature of the Case	2
A. The Statute	2
B. The Proceedings Below	3
II—Argument	5
A. The judgment rests on an adequate and independent non-federal ground	5
B. The case does not present a substantial federal question	6
III—Conclusion	8

Cases Cited

Bigley, Application of, In re, 55 N. J. 53, 259 A.2d 213 (Sup. Ct. 1969)	5, 6
City of Cincinnati v. Kellogg, 92 N. E. 2d 609 (Ohio App. Ct. 1949), aff'd 91 N. E. 2d 505 (Ohio Sup. Ct. 1950)	7
Guaranty Trust Co. v. Blodgett, 287 U. S. 509 (1933) ..	6
Kingsley Pictures v. Regents, 360 U. S. 684 (1959) ..	6
Mackey v. City of Little Rock, 94 F.2d 546 (8 Cir. 1938), cert. den. 304 U. S. 582 (1938)	7
Middlesex Concrete, etc., Corp. v. Carteret Borough, 27 N. J. Super. 473, 99 A.2d 555 (Cty. Ct. 1953) ..	7

	PAGE
Mitchell v. City of Nogales, 83 Ariz. 328, 320 P.2d 955 (Sup. Ct. 1958)	7
Schragger, Application of, In re, 58 N. J. 274, 277 A.2d 212 (Sup. Ct. 1971)	5
Statutes Cited	
N.J.S.A. 2A:158-7	2-4
N.J.S.A. 40A:4-1 ("Local Budget Law")	4
Other Authorities Cited	
74 Am. Jur. 2d, Taxpayers' Actions: Sec. 47, pp. 259-260	7
Annotation: 84 ALR 2d 1412, Intervention as a Matter of Right, Sec. 41, pp. 1451-1452	7
Pressler, Current N. J. Court Rules: R. 4:33-1 to R. 4:33-3	8

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**On Appeal from the New Jersey Superior Court,
Appellate Division**

MOTION TO DISMISS OR AFFIRM

The appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the New Jersey Superior Court, Appellate Division, on the grounds that the judgment rests on an adequate non-federal basis and that it does not present a substantial federal question.

I.

The Statute Involved and the Nature of the Case**A. The Statute**

This appeal raises the question of the validity of a provision of N.J.S.A. 2A:158-7 (New Jersey Statutes Annotated, Title 2A, Administration of Civil and Criminal Justice, §2A:158-7, "Expenses of prosecutors in enforcement of laws").

The challenged provision of the statute empowers the assignment judge of the superior court for a county to authorize by order the expenditure of necessary expenses incurred by the prosecutor for said county, which expenses exceed the amount fixed by the board of chosen freeholders in its regular or emergency appropriation.¹

¹ The statute reads:

All necessary expenses incurred by the prosecutor for each county in the detection, arrest, indictment and conviction of offenders against the laws shall, upon being certified to by the prosecutor and approved, under his hand, by a judge of the superior court of the county court for such county, be paid by the county treasurer whenever the same shall be approved by the board of chosen freeholders of such county. The amount or amounts to be expended shall not exceed the amount fixed by the board of chosen freeholders in its regular or emergency appropriation, unless such expenditure is specifically authorized by order of the assignment judge of the superior court for such county.

B. The Proceedings Below

On August 15, 1975, the Prosecutor's Office of Hunterdon County was converted to full time status pursuant to a statute which was passed on July 9, 1975. Appellee, Oscar W. Rittenhouse, was appointed as full time prosecutor.

By letter dated December 15, 1975, appellee submitted a budget request for 1976 for his office to the Hunterdon County Board of Chosen Freeholders (hereinafter Board). Contained therein was a request for funds to hire additional personnel and to provide salary increases for existing personnel. After conducting public hearings, the Board passed the county budget for 1976, but did not appropriate monies for appellee's request for additional personnel and salary increases for existing personnel.

On March 9, 1976, pursuant to the provisions of N.J.S.A. 2A:158-7, appellee filed a petition with the assignment judge of the Superior Court for Hunterdon County, the Honorable George Y. Schoch. He requested that the assignment judge authorize the additional expenditures. Notice of appellee's petition was served upon the Board.

On March 19, 1976, the assignment judge conducted a hearing with respect to the aforementioned petition. Appellant was present at the hearing. Following the testimony of the first witness, appellant orally requested permission to question the witness. The assignment judge referred appellant to the county counsel. After consulting with appellant, the county counsel stated that he had no further questions of the witness. Additional testimony was taken.

In a letter opinion dated March 31, 1976, the assignment judge established his jurisdiction over appellee's petition and stated that a present and urgent need existed

for the additional personnel requested by appellee and that the request for increased salaries for the present staff was justified. On April 20, 1976, the assignment judge entered an order in accordance with his opinion.

Appellant filed a notice of appeal to the Appellate Division of the Superior Court, dated May 6, 1976, from the above decision and order. He contended that (1) the hearing before the assignment judge was violative of due process requirements, (2) N.J.S.A. 2A:158-7 is an unconstitutional delegation of the taxing power of the Legislature to the judicial branch, and (3) N.J.S.A. 2A:158-7 has been repealed by N.J.S.A. 40A:4-1 *et seq.*, the "Local Budget Law."

On May 27, 1976, the time for appeal by the Board of Freeholders expired without an appeal being taken. On June 17, 1976, appellee filed a notice of motion to dismiss the appeal on the ground of lack of standing. On July 9, 1976, decision of the motion was reserved by order of the court pending oral argument and determination of the appeal.

On November 9, 1976, the Appellate Division of the Superior Court affirmed the order of the assignment judge for the reasons expressed in his opinion. The court perceived no merit in appellant's various arguments, and in view thereof, it did not address itself to the threshold question of standing.

On January 18, 1977, the Supreme Court of New Jersey denied appellant's petition for certification and granted the Attorney General's motion to dismiss appellant's appeal.

II.

ARGUMENT

A. The judgment rests on an adequate and independent non-federal ground.

Appellant, who was not a party to the proceeding before the assignment judge, prosecuted an appeal from the order of the assignment judge to the Appellate Division of the Superior Court of New Jersey. He urged, *inter alia*, that the hearing was violative of his right to due process under the Federal Constitution. This was the first instance in the proceedings that a federal question was raised. The Appellate Division of the Superior Court affirmed the order:

Our review of the entire record satisfies us that the order had ample record support and was entirely appropriate. We perceive no merit in appellant's various arguments warranting reversal and affirm substantially for the reasons expressed by Judge Schoch in his letter opinion filed in the Law Division.

In his letter opinion, the assignment judge established his authority to act as a legislative agent, rather than as a judicial officer, and to make an original evaluation of the prosecutor's application for additional monies. He relied upon the New Jersey Supreme Court's decisions in *In re Application of Bigley*, 55 N.J. 53, 259 A.2d 213 (Sup. Ct. 1969), and *In re Application of Schragger*, 58 N.J. 274, 277 A.2d 212 (Sup. Ct. 1971), which case reaffirmed the *Bigley* holding. The assignment judge then reviewed the testimony of the witnesses at the hearing before him and granted the relief sought by the prosecutor. There was no federal question raised before the assignment judge.

The state court's decision was based entirely upon the New Jersey Supreme Court's construction of the statute, viz. the assignment judge is constituted a legislative agent with final and conclusive authority to evaluate and determine the ultimate monetary requirements of the prosecutor. The federal question raised by appellant was perceived as having no merit. The court found adequate support in the record for the assignment judge's order.

B. The case does not present a substantial federal question.

The questions presented by appellant are wholly formal. When examined with reference to the averments of fact upon which the questions were made to depend, they are so absolutely devoid of merit as to be frivolous.

(i)

The Supreme Court on appeal must accept the state court's construction of the statute and proceed to test its validity on that basis. *Kingsley Pictures v. Regents*, 360 U.S. 684, 688 (1959); *Guaranty Trust Co. v. Blodgett*, 287 U.S. 509, 513 (1933). The New Jersey Supreme Court has interpreted the pertinent language of the statute in *In re Application of Bigley*, 55 N.J. 53, 259 A.2d 213 (Sup. Ct. 1969). It was held that under the statute, the assignment judge acts as a legislative agent with the duty to make an original evaluation of the ultimate monetary needs of the prosecutor. The determination of the assignment judge is final and conclusive. *Id.*, 55 N.J. at 57, 59, 259 A.2d at 214-215, 216. With respect to notice, the court construed the statute as requiring the prosecutor to provide the county board of chosen freeholders with notice of his application to the assignment judge. *Id.*, 55 N.J. at 61, 259 A.2d at 217. The court held that the freeholders "do speak for the taxpayers who must meet the

added charge, and it therefore is appropriate, notwithstanding the absence of a legislative mandate, that the prosecutor make an initial request of the freeholders unless circumstances excuse that course." *Id.*

The requirement of notice to the county board of chosen freeholders satisfies due process. Representation by the appropriate public body is deemed adequate to protect the interest of the resident taxpayers in the absence of gross negligence, collusion or bad faith on the part of such public body. *Mitchell v. City of Nogales*, 83 Ariz. 328, 320 P. 2d 955, 957 (Sup. Ct. 1958); *City of Cincinnati v. Kellogg*, 92 N.E. 2d 609, 611-612 (Ohio App. Ct. 1949), aff'd 91 N.E. 2d 505 (Ohio Sup. Ct. 1950); 84 ALR 2d 1412, Anno: Intervention as a Matter of Right, §41, pp. 1451-1452; 74 Am. Jur. 2d Taxpayers' Actions §47, pp. 259-260. See *Mackey v. City of Little Rock*, 94 F.2d 546, 549 (8 Cir. 1938), cert. den. 304 U.S. 582 (1938). To permit the participation of a taxpayer in a matter to which a public body is a party and which concerns the rights of taxpayers generally would allow the county, in effect, to have two attorneys of record. See *Middlesex Concrete, etc., Corp. v. Carteret Borough*, 27 N.J. Super. 473, 475, 99 A.2d 555, 556 (Cty. Ct. 1953). The input of the taxpayer comes initially at the public hearings held by the board on the county budget and specifically on the budget request of the prosecutor's office. It is at such hearings that the views of the taxpayers are made known. The board is thus armed to make a determination as to budget appropriations and to defend that determination before the assignment judge.

(ii)

Appellant's contention that he was "arbitrarily denied" participation in the hearing before the assignment judge is patently frivolous. He was not a party to the pro-

ceedings, but merely requested that he be permitted to question a witness. The assignment judge directed him to speak through the county counsel who represented the board of chosen freeholders. At no time had appellant utilized the vehicle of intervention as prescribed by the Rules Governing the Courts of the State of New Jersey. (Pressler, *Current N.J. Court Rules*, R. 4:33-1, 2, 3). Participation in the hearing may have been accorded appellant had he complied with the proper procedure.

III.

CONCLUSION

Wherefore, appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument and that the judgment rests on an adequate non-federal basis, and appellee respectfully moves the Court to dismiss this appeal or, in the alternative to affirm the judgment entered in the cause by the Appellate Division of the Superior Court of New Jersey.

Respectfully submitted,

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